

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

In Re: Pork Antitrust  
Litigation

)  
) File No. 18-CV-1776  
) (JRT/HB)  
)  
)  
) St. Paul, Minnesota  
) November 19, 2019  
) 9:30 a.m.

BEFORE THE HONORABLE HILDY BOWBEER  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE  
(MOTION HEARING)

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transcript produced by computer.

**P R O C E E D I N G S**

**IN OPEN COURT**

THE LAW CLERK: All rise. Court is now in session, the Honorable Magistrate Judge Hildy Bowbeer presiding.

THE COURT: Good morning, everyone. Please be seated.

We are on the record in the In Re Pork Antitrust Litigation, Matter No. 18-CV-1776. And specifically we are here on defendant's motion for a protective order concerning ex parte lawyer communications, which is Docket No. 374.

I know that my law clerk has gone through and figured out who's here, but we should probably make a record of that for the transcript as well. So let me go through each of the groups and get on the record who is here, and if you could also indicate for me as you introduce yourself whether you intend to be heard today or whether you're just going to be listening intelligently and attentively to the proceedings.

So let's start with counsel for the Direct Purchaser Plaintiffs.

MR. CLARK: Your Honor, Brian Clark, Lockridge, Grindal, Nauen for Direct Purchaser Plaintiffs. I intend to only listen.

THE COURT: How about -- well, anybody else here

1 for the Direct Purchaser Plaintiffs?

2 MR. BOURNE: Yes. Good morning, Your Honor --

3 MR. PEARSON: Yes, Your Honor. Clifford Pearson,  
4 Pearson, Simon & Warshaw.

5 THE COURT: All right. Good morning.

6 MR. PEARSON: I don't intend to speak, Your Honor.

7 THE COURT: All right. Thank you.

8 MR. PEARSON: I will listen intently.

9 THE COURT: Okay. Sounds good.

10 MR. BOURNE: And Joe Bourne from Pearson, Simon &  
11 Warshaw.

12 THE COURT: Very well. And you are not intending  
13 to argue either?

14 MR. BOURNE: No, Your Honor.

15 THE COURT: Okay. Anybody else here, whether in  
16 person or on the phone, for the Direct Purchaser Plaintiffs?  
17 All right.

18 Let's turn then to the Commercial Institutional  
19 Indirect Purchaser Plaintiffs. Who's here on behalf of that  
20 group?

21 MR. RAITER: Shawn Raiter, Your Honor. I do not  
22 intend to speak.

23 THE COURT: Okay. Who else?

24 MR. FINLEY: Blain Finley on the phone, and I do  
25 not intend to speak.

1 THE COURT: And how about on behalf of the  
2 Consumer Indirect Purchaser Plaintiffs?

3 MS. SCARLETT: Shana Scarlett from Hagens, Berman.  
4 And I will be speaking on behalf of the Consumer Indirect  
5 Purchaser Plaintiffs.

6 MS. RESCH: And Brittany Resch from Gustafson  
7 Gluek, and I do not intend to speak.

8 MR. GUSTAFSON: Good morning, Your Honor. Dan  
9 Gustafson on behalf of Consumer Indirect Purchaser  
10 Plaintiffs, and I will not be speaking.

11 THE COURT: Then anybody else on behalf of any of  
12 the groups of plaintiffs that I haven't heard from? All  
13 right.

14 Then let's turn to the defendants. Is anyone here  
15 on behalf of Agri Stats? Anyone here?

16 MR. BERNICK: Yes, Your Honor. This is Justin --

17 THE COURT: Go ahead.

18 MR. BERNICK: Sorry. Yes, Your Honor. This is  
19 Justin Bernick from Hogan Lovells on behalf of Agri Stats.

20 THE COURT: All right. Thank you.

21 Anyone else?

22 How about on behalf of Clemens Food Group?

23 MS. BRIESACHER: Good morning, Your Honor.  
24 Christina Briesacher from Kirkland & Ellis, and I will be  
25 presenting our motion today.

1 MS. SHARKEY: Good morning, Your Honor. Christina  
2 Sharkey, also from Kirkland Ellis. I do not intend to speak  
3 today.

4 MR. JOHNSON: Mark Johnson from Greene Espel, Your  
5 Honor. I won't be speaking.

6 THE COURT: Anyone on the phone for the Clemens  
7 Food Group?

8 Turning to Hormel.

9 MR. DUNCAN: Richard Duncan and Emily Chow from  
10 Faegre, Baker, Daniels, and we will not argue.

11 THE COURT: Anyone on the phone for Hormel?

12 Turning to Indiana Packers.

13 MS. STILSON: Good morning, Honor. Jamie Stilson  
14 from Dorsey on behalf of Indiana Packers. I will not be  
15 speaking today, Your Honor.

16 THE COURT: And anyone on the phone for Indiana  
17 Packers?

18 How about Seaboard Foods?

19 MR. GREENE: Your Honor, William Greene of Stinson  
20 for the Seaboard Defendants. I will not be speaking today.

21 THE COURT: Anyone on the phone for Seaboard?

22 Smithfield Foods.

23 MR. COTTER: Good morning, Your Honor. John  
24 Cotter from Larkin Hoffman for Smithfield Foods. I will not  
25 be speaking.

1 THE COURT: Anyone on the phone for Smithfield  
2 Foods?

3 Triumph Foods?

4 MR. SUMMERLIN: Good morning, Your Honor. This is  
5 Gene Summerlin from Husch Blackwell on behalf of Triumph,  
6 and I don't intend to speak today.

7 THE COURT: Anyone else for Triumph?

8 Tyson Foods.

9 MR. GRAHAM: David Graham from Dykema Gossett. I  
10 don't intend to speak today.

11 THE COURT: Anyone else for Tyson?

12 MS. ROHRBAUGH: And Tiffany Rider Rohrbaugh from  
13 Axinn on behalf of Tyson.

14 THE COURT: Okay. JBS.

15 MR. HEEMAN: Good morning, Your Honor. Don Heeman  
16 from Spencer Fane on behalf of JBS Defendants. I will just  
17 be listening.

18 THE COURT: And is anyone else either in the  
19 courtroom or on the phone for JBS?

20 MR. RASHID: Good morning, Your Honor. This is  
21 Sami Rashid from Quinn Emanuel on behalf of JBS USA. I  
22 don't intend to speak today.

23 THE COURT: Anyone from Mitsubishi?

24 Is there any counsel for any defendant -- oh, I'm  
25 sorry. Go ahead.



1 MS. STILSON: Well, Your Honor, I believe they are  
2 not in any of the operative complaints, but obviously they  
3 are a parent of Indiana Packers.

4 THE COURT: All right.

5 Anyone for any of the defendants, either in the  
6 courtroom or on the phone, that I've not yet called on or  
7 has not brought themselves to my attention?

8 Okay. Then let's proceed with the motion. And,  
9 Ms. Briesacher, I believe you said you'd be arguing for the  
10 Defendants.

11 MS. BRIESACHER: Yes, Your Honor.

12 THE COURT: Please go ahead.

13 MS. BRIESACHER: May I proceed, Your Honor?

14 THE COURT: Yes.

15 MS. BRIESACHER: Your Honor, we're here today  
16 because, frankly, we have concerns about the tactics that  
17 plaintiffs are using when contacting potential witnesses in  
18 this case. And while plaintiffs are certainly entitled to  
19 conduct an investigation, they must do so within the bounds  
20 of the ethical rules, rules that were put in place to impose  
21 safeguards on when and how to communicate with represented  
22 and unrepresented parties.

23 We're here today --

24 THE COURT: Now, by "parties," though, you're  
25 using "parties" sort of in the broadest sense, in other

1 words, represented and unrepresented?

2 MS. BRIESACHER: Individuals, correct, Your Honor.

3 And today we're here to propose guidelines  
4 outlining what the law requires in this area. And we  
5 believe that these guidelines will benefit all parties, but  
6 will really force some rigor into this process as the  
7 ethical rules require.

8 Now I'd like to take a minute and just level set  
9 how we got here. Mr. John Reininger is a long-time employee  
10 of Clemens. He has been employed at the company for nearly  
11 30 years. He is a senior executive. His title currently is  
12 the Chief Relationship Officer.

13 Mr. Reininger has been known to the plaintiffs  
14 since very early in the case. He was on over a dozen  
15 organizational charts that we produced, including the most  
16 recent. And we also specifically discussed Mr. Reininger  
17 with the plaintiffs. They demanded that he be added as a  
18 document custodian during the meet and confer process. And  
19 in July, we discussed Mr. Reininger on one of our meet and  
20 confer calls. And to put this in context, it was a month  
21 essentially before they called him -- their investigator  
22 called him.

23 You know, what's more, even setting aside what we  
24 told them or what was in our documents, really just a simple  
25 Google search would have revealed his affiliation with

1 Clemens. This is something that I did on my own, Your  
2 Honor. If you just Google "John Reininger," his name  
3 appears within the first few hit results. It actually links  
4 to his LinkedIn page showing he is a current employee. Or  
5 if you Google "John Reininger hog" or "John Reininger pork,"  
6 it actually links to the Clemens website and is the first  
7 search result. And it links to the current senior  
8 leadership of Clemens. It has John Reininger's name, his  
9 picture, his title. And that, actually, is the web page we  
10 attached at Exhibit 3 to our motion.

11 So plaintiffs cannot say that they did not know he  
12 was a current employee. We discussed it with them, and  
13 really a simple internet search would have advertised it.  
14 Despite knowing that he was a current employee, they called  
15 him.

16 THE COURT: Well, and my understanding is  
17 plaintiffs' counsel acknowledge that they did know that he  
18 was an employee but have said that somehow -- I want to  
19 understand better -- but that somehow that word didn't get  
20 to the investigator.

21 MS. BRIESACHER: Yes. Correct. Correct.

22 So despite knowing this, their investigator  
23 reached out to him. On August 28th, 2019, Mr. Reininger  
24 received a voicemail. When he listened to the voicemail,  
25 the caller identified himself as a "researcher looking into

1 the pork industry." He didn't mention the lawsuit, his firm  
2 or anything about this case.

3 Kind of believing he was just an academic  
4 researcher, Mr. Reininger called him back. During the  
5 two-minute discussion that followed -- and we know it's two  
6 minutes, Your Honor, because we have a record of the call  
7 log showing the length of the time, and I have a screenshot  
8 here if you're interested in seeing it -- the plaintiffs  
9 asked Mr. Reininger questions related to his experience hog  
10 farming.

11 Mr. Reininger asked the investigator, you know,  
12 what are you looking for? And the investigator only  
13 provided some vague responses about looking into information  
14 generally.

15 During this two-minute phone call, plaintiffs'  
16 investigator did not disclose his affiliation with the firm,  
17 disclose his involvement with the case, ask Mr. Reininger  
18 where he worked or whether he worked for a defendant, or  
19 asked if he was represented.

20 It was only after they hung up that Mr. Reininger  
21 thought, you know, there was something off about the call,  
22 that it was odd. So he actually looked up the name of the  
23 caller and then saw, you know, this wasn't an academic  
24 researcher. This was the plaintiffs.

25 When we first put plaintiffs on notice that they

1 spoke with a current employee, they initially denied it.  
2 And then we told them no, your assertion is incorrect. You  
3 reached out to a current officer and executive of the  
4 company that was on our organizational charts and that we  
5 spoke about during meet and confers. And then they said  
6 that it was an inadvertent error.

7 THE COURT: Is there any information indicating  
8 that Mr. Reininger told the investigator anything that --  
9 and I know this isn't your only concern -- but that he  
10 actually said anything to the investigator that disclosed  
11 confidential or privileged or prejudicial information in any  
12 way?

13 MS. BRIESACHER: No, Your Honor. We do not  
14 believe that there was any privileged communications that  
15 Mr. Reininger told the investigator.

16 You know, he'd asked about his experience with hog  
17 farming. They talked about that. He actually asked the  
18 investigator what he was looking for. And, you know, there  
19 were some vague responses and then the call ended.

20 So we agree that there was no privileged  
21 communications revealed on that phone call, but that doesn't  
22 address our concern that it shouldn't have happened in the  
23 first place.

24 THE COURT: About why.

25 MS. BRIESACHER: We found this extremely

1       troubling, particularly that a seemingly experienced  
2       investigator who admits that he knew enough about  
3       Mr. Reininger to know that he worked with pork companies for  
4       awhile, but apparently never connected with his team to know  
5       that, yes, this is a current employee or never did even a  
6       simple internet search which would have revealed that he is  
7       the current Chief Relationship Officer.

8               So this concern is what lead to our request that  
9       plaintiffs agree to provide certain disclosures in future  
10      interviews to avoid any future mistakes, inadvertent or  
11      otherwise.

12             THE COURT: So tell me about your meet and confer  
13      process, because it's not feeling like it was really robust  
14      here. Now, I understand, and I want to understand this  
15      better from plaintiffs' counsel as well that initially said  
16      no, it didn't happen, and I realize that could've been  
17      off-putting, but still tell me what efforts you made to have  
18      a really interactive conversation with plaintiffs' counsel  
19      about whether there was harm done on this occasion and what  
20      you might be able to agree upon to make sure that it didn't  
21      happen again.

22             MS. BRIESACHER: Yes. Your Honor, you know, we  
23      engaged in over a month and a half of correspondence with  
24      the plaintiffs. It's true --

25             THE COURT: Calling? Was there any calling?

1 MS. BRIESACHER: Your Honor is correct that there  
2 were no calls. We engaged in a month and a half of email  
3 correspondence with the plaintiffs.

4 It is correct that their final correspondence did  
5 offer to meet and confer to the extent we had questions  
6 about their proposal. Your Honor, we just didn't have any  
7 questions about their proposal. We just didn't agree with  
8 it.

9 It's clear that we have a fundamental disagreement  
10 on certain aspects of required disclosures, including the  
11 timing of disclosures, what disclosures should be provided,  
12 and to whom they should be provided. So we believed, Your  
13 Honor, that the time was ripe to bring these issues to the  
14 Court for some guidance. So that's what we did, Your Honor.

15 THE COURT: So tell me about where -- map out for  
16 me where you believe you and plaintiffs agree, presumably  
17 there are some areas of overlap, and where you see  
18 divergence, where you're asking for this and they're saying  
19 no or you're asking for this and they're saying, well, no,  
20 not like that, like something else.

21 MS. BRIESACHER: Sure. So I will take this in  
22 three bundles. So I'll start with when must disclosures be  
23 made. And there, Your Honor, we have a fundamental  
24 disagreement on when disclosures must be made.

25 We assert that disclosures, including that you

1 work for plaintiffs, should be made at the outset of any  
2 call or interview. Plaintiffs' proposal in contrast says  
3 that disclosures will be made only before any kind of  
4 "substantive communication." They argued in their  
5 opposition that they would be made after some kind of  
6 verification of the witness's identity. But really either  
7 proposal is unworkable and here's why.

8 If plaintiffs do not need to provide disclosures  
9 until a conversation turns "substantive" and if we took  
10 Mr. Reininger for example, when would that be? After he  
11 talked about his work as a hog farmer? At no point, leaving  
12 him with a misimpression entirely because they didn't view  
13 the information he provided as substantive? Or kind of  
14 taking their proposal on verifying a witness's identity,  
15 when do they decide it has been verified, how many minutes  
16 into the discussion?

17 Here the investigator spoke with Mr. Reininger for  
18 two minutes without ever identifying himself. Two minutes  
19 is a really long time to be on the phone with somebody  
20 without telling them who you are, your affiliation with the  
21 case, or what the purpose of the call is, or asking if  
22 they're represented.

23 There's really no benefit to this gray area line  
24 drawing that plaintiffs are proposing. The timing here  
25 should be simple -- when the call starts -- so everyone



1 knows who is who and what the purpose is. And this will  
2 bring to the forefront immediately whether the individual is  
3 represented.

4 This simple approach is consistent with the case  
5 law we've attached. We've cited to *Eldredge v. City of St.*  
6 *Paul*. And there the court required disclosures and said  
7 that they should occur "prior to any interview."

8 THE COURT: But is that necessarily across the  
9 board? In other words, doesn't it make a difference -- and  
10 I realize what didn't happen here that should've happened  
11 here was either the investigator being better informed about  
12 who he was or wasn't calling in the first place -- but  
13 wouldn't the natural place to start be confirming the  
14 identity of the individual and finding out right away  
15 whether he or she is or isn't a current or former employee  
16 of a party?

17 MS. BRIESACHER: Yes. That's what they say, but  
18 that's not happening here, because if you get two minutes  
19 into a discussion without ever saying, oh, by the way, I'm  
20 working for the plaintiffs, are you represented in this  
21 case, then whatever method they're doing to verify identity  
22 doesn't work. I mean, it takes two seconds to say is this  
23 John Reininger? Yes. Okay. Mr. Reininger, I am Matt  
24 Isaacs. I work for the plaintiffs' law firm in this case.

25 I mean, if those disclosures would've been made at

1 the outset, this motion could've been avoided. And that's  
2 something simple that can be done right at the outset. It  
3 takes 15 seconds to do, but it's a check. It's to make sure  
4 whatever assumptions you have about whether the plaintiff is  
5 a party, whether they're a third party, whether they're  
6 adverse or neutral, it's a check on those assumptions if you  
7 just simply ask somebody -- tell them about the case and ask  
8 if they are represented in the case.

9 So we do have a dispute about when disclosures  
10 must be made, and then I have a quick point I want to make  
11 about voicemails.

12 So the plaintiffs argue that they should not have  
13 to make any disclosures in a voicemail. They claim that  
14 making disclosures in a voicemail could lead to "confusion  
15 or misunderstandings." However, their current approach of  
16 identifying themselves as mere researchers is absolutely  
17 causing confusion and is leading to misunderstandings as  
18 evidenced by what happened with Mr. Reininger. I mean, he  
19 thought they were academic researchers until he himself  
20 Googled them after this confusing two-minute call and he saw  
21 no, these are the people that are suing us.

22 THE COURT: If the person on the other end of the  
23 phone -- if Mr. Reininger had not been an employee or even a  
24 former employee but really was somebody working in the hog  
25 industry, do you maintain that it would have been improper

1 or against any of the case law or the ethical rules for  
2 Mr. Isaacs to say what he said? I'm a researcher. I'm  
3 looking into the hog industry. I'd like to talk to you. Is  
4 there something more or different that you believe the  
5 ethical rules or the case law required if we hypothesize  
6 that the person on the other end of the phone was of the ilk  
7 that the researcher says he thought they were?

8 MS. BRIESACHER: Yes, and really what you are  
9 asking is to whom these disclosures should be made. Should  
10 they only be made to current and former? Should they be  
11 made to everyone? Really we see for at least kind of  
12 certain of the disclosures no difference between the two.

13 Rule 4.3 -- you know, the comments of Rule 4.3  
14 state -- and this is dealing with unrepresented parties,  
15 third parties in the case, adverse or neutral -- that in  
16 order to avoid misunderstandings, a lawyer will typically  
17 need to identify the lawyer's client.

18 That rule also contains an obligation to correct  
19 any misunderstanding if you reasonably know that the person  
20 doesn't kind of understand the lawyer's role in the case.

21 4.4 says a lawyer cannot use methods of obtaining  
22 evidence that violate the rights of the third parties.

23 So, at a minimum, with individuals that you  
24 believe are true third party, non-adverse witnesses you at  
25 least should be identifying yourself, your affiliation with

1 the law firm, and asking if they're represented, again, just  
2 as a check.

3 If plaintiffs are able to proceed as they have and  
4 not provide any disclosures to individuals that they believe  
5 are non-adverse, kind of neutral third parties, then that  
6 won't kind of solve the issue that brought us here in the  
7 first place, because with Mr. Reininger they didn't believe  
8 that.

9 So if they're able to just continue to tell these  
10 people that they are researchers in the industry and not  
11 provide any of these basic, routine disclosures about who  
12 they are and the purpose, it could allow conversations --  
13 prohibited conversations like the one that occurred with  
14 Mr. Reininger to continue.

15 Now, Your Honor, I'd like to turn next to our kind  
16 of next bucket of cases, which is what disclosures must be  
17 made. And here we proposed six routine disclosures. As  
18 part of our exchange prior to this motion, the plaintiffs  
19 kind of appear to agree that their disclosures will now  
20 include that the lawyer investigator states their  
21 affiliation with the law firm they work for and, two, that  
22 they'll inquire and confirm whether the witness is a current  
23 employee. Now, they have agreed to do this, again, for  
24 certain individuals, the current and formers, but are  
25 objecting to anyone else.

1           The parties do have a dispute about some of the  
2           remaining disclosures, including inquiring whether the  
3           individual is represented, informing the individual they  
4           should not divulge privileged communications, and their  
5           rights to be interviewed and have counsel present. These  
6           disclosures are routine. They have been ordered in other  
7           cases.

8           THE COURT: But not for truly unaffiliated  
9           parties, right?

10          MS. BRIESACHER: It is correct that there has been  
11          the case law --

12          THE COURT: Nonparties.

13          MS. BRIESACHER: The case law that we found --  
14          this issue doesn't come up very much, probably because these  
15          things are generally routine and most times they're used as  
16          a default, but the cases that we work under are a little  
17          unique because it is plaintiffs bringing most of these  
18          motions in order to seek the court's permission to contact  
19          certain current or former employees.

20          THE COURT: And I agree it makes perfect sense for  
21          those. I'm just trying to understand where in the case law  
22          or in the rules I would find support for the idea that  
23          someone who is not a current or former employee should be  
24          told that they've got a right to have counsel present for an  
25          interview.

1 MS. BRIESACHER: Well, Your Honor, I think it  
2 again goes back to 4.3 and 4.4. And, you know, for those  
3 individuals that plaintiffs believe are truly third party  
4 and neutral, non-adverse, I think it kind of goes back to  
5 the rules of avoiding misunderstanding and ensuring that  
6 your methods of obtaining evidence aren't violating anyone's  
7 legal rights.

8 So it's certainly true that nobody has an  
9 obligation to talk to them and that they can have a lawyer  
10 of their choosing present. But, at a minimum, Your Honor,  
11 for these individuals that plaintiffs believe to be  
12 non-adverse third parties, we would request that there be  
13 some basic disclosures. The first three that we would  
14 propose: You identify yourself and your affiliation; you  
15 identify the purpose of the call, seeking information about  
16 the lawsuit; and you ask the person if they're represented.

17 If third parties are provided those three basic  
18 disclosures, it would address what brought our motion, the  
19 concerns that brought our motion today, and that's to check  
20 that plaintiffs' assumptions are in fact accurate as to  
21 whether the person is adverse or neutral.

22 Your Honor, plaintiffs essentially here are trying  
23 to argue no harm no foul. They assert this motion is  
24 unnecessary because there was no substantive discussion with  
25 Mr. Reiningger, and they allege they have not contacted any

1 other represented parties.

2 Now, frankly, we can only take them at their word  
3 that they haven't contacted anyone else; although, their  
4 investigator did say, you know, that he had no substantive  
5 communications with any other represented parties. I'm not  
6 really sure what that means. But even if we take them at  
7 their word that no one else has been contacted, you know,  
8 this motion and an order like this may not have been  
9 necessary kind of before this became an issue and before we  
10 learned of what happened and they initially denied it and  
11 then called it an inadvertent error, but now we live in a  
12 world where they have contacted a senior executive and  
13 contacted a senior executive who had no idea who they were.

14 So the reality is really there is no harm in  
15 setting clear guidelines, Your Honor, on what is expected  
16 when either side contacts a witness, particularly given the  
17 massive gray area that exists, and that we know of at least  
18 one senior investigator had no idea this happened.

19 So that's really what we're asking here today,  
20 guidance to avoid ambiguity, to ensure the parties are on  
21 the same page, and to ensure this doesn't happen again.

22 THE COURT: All right. Thank you.

23 Ms. Scarlett.

24 MS. SCARLETT: Shana Scarlett from Hagens on  
25 behalf of the Consumer Indirect Purchaser Plaintiffs.

1 THE COURT: I'm going to have you raise the  
2 podium, or at least the microphone, to make sure we can all  
3 hear.

4 MS. SCARLETT: So Mr. Isaacs is a case  
5 investigator that is employed full-time by my firm, Hagens  
6 Berman. He works in the office that I work in, the Berkeley  
7 office, of which I'm a managing partner. Mr. Isaacs has  
8 worked extensively with my firm doing this type of case  
9 investigation.

10 In a world where *Twombly* came down from the  
11 Supreme Court and it became much more difficult to have  
12 antitrust cases being brought, especially where conspiracies  
13 oftentimes operate in secret, my firm performs extensive  
14 case investigations before bringing cases like this one, the  
15 pork antitrust case.

16 This case was brought in June 2018. We conducted  
17 over six months of investigation prior to bringing the case.  
18 We had case investigators discussing the industry with  
19 witnesses. We spoke to former employees of the companies.  
20 We engaged economists. We used trained investigators to  
21 talk to these witnesses outside of the firm. We reviewed  
22 extensive public records.

23 These types of cases are extraordinarily  
24 difficult, and we want to get them right, and we want to  
25 make sure that we are bringing cases that have merit. We're



1 very cautious. It is our firm policy to only contact former  
2 employees, even though there are circumstances where it  
3 would be fine to contact current employees. We have just  
4 made it a firm policy, as Mr. Berman, our managing partner,  
5 made clear in his declaration, that our investigators are  
6 instructed only to avoid current employees.

7 What happened here was a simple mistake. Our case  
8 investigator is an extraordinary gentleman. He has an  
9 incredible history as an investigative journalist in an  
10 industry that, as some of us know, is not doing well. He  
11 was a professor, so he taught at U.C. Berkeley. He taught  
12 Investigative Journalism. He conducted in-depth  
13 investigations into criminal ongoing in casinos. He's just  
14 an extraordinary man who operates to the highest  
15 professional standard.

16 THE COURT: So how did this happen?

17 MS. SCARLETT: So let me explain how this  
18 happened. There are 12 defendants in this case. At one  
19 point in time, we were discussing 391 custodians. The teams  
20 discussing custodians were split across firms and even split  
21 across groups within my firm.

22 Mr. Isaacs, our case investigator, was conducting  
23 interviews at the time and did have lists of the current  
24 employees, but these org charts are very opaque. They're  
25 not initially very easy to understand. This was just a

1 simple mistake.

2 Mr. Isaacs' practice, our practice as a firm, is  
3 to make contact with someone and then first verify their  
4 identity and that they are the person that we're looking  
5 for. When Mr. Isaacs tried to identify the identity of  
6 Mr. Reininger -- and I might not be saying that right -- the  
7 witness misrepresented that he was not affiliated with the  
8 pork industry. Had he have said he was affiliated with the  
9 pork industry, then the series of disclosures that normally  
10 happens would've happened here and it would've been  
11 confirmed that he was a current employee and the call would  
12 have ended. So but for that misrepresentation by the  
13 defendant's employee, we would not be in this situation.

14 We all agree this was just a two-minute call. We  
15 didn't go back to the phone records, but we're just assuming  
16 the defendants are correct in asserting it was a two-minute  
17 call. That's a very short period of time.

18 Mr. Isaacs told Mr. Reininger that he was  
19 interested in speaking with hog farmers. I think that  
20 clearly indicates he did not have any understanding that  
21 this was an employee from one of the defendants when he said  
22 he was particularly interested in speaking with people who  
23 had worked on a farm.

24 At the time of these phone calls, we were  
25 investigating the structure of the industry. We were not

1       trying to contact the current or former employees of the  
2       pork defendants. We were looking much more strictly at the  
3       industry itself in trying to determine how that is the same  
4       or different from other industries. When Mr. Reininger said  
5       he was not affiliated with the industry, the call ended.

6               The guidelines proposed by the defendants are  
7       vastly overbroad. First of all, they would impede our  
8       ability to talk to others unaffiliated with the defendants.  
9       We are the Indirect Purchaser Plaintiffs. We need to show  
10      pass-through. We need to show an overcharge due to  
11      conspiracy and that that was passed through down to the  
12      class, the consumers that ended up buying this pork.

13             We conduct many interviews. We issue subpoenas.  
14      We negotiate data. We talk to a lot of people about that  
15      very issue, the issue of pass-through. Defendants' proposed  
16      guidelines would impact all of those interviews. When we  
17      call to ask someone for essentially how does pricing at a  
18      grocery store work, under defendants' guidelines we would  
19      then have to say to them -- ask whether or not they are  
20      currently represented, tell them they have the right to  
21      refuse to be interviewed, tell them they have the right to  
22      counsel of their choosing. These type of disclosures in  
23      that context would be almost, you know, deafening for  
24      plaintiffs' investigation and stop us from being able to  
25      talk to industry participants that we need to talk to to

1 fully understand this case.

2 The defendants say we have a dispute over timing  
3 where they are asking for this to be made at the outset of  
4 the interview. From our perspective, this is something we  
5 already do. Had in this instance Mr. Reininger accurately  
6 said that he was affiliated with the industry and our case  
7 investigator been able to confirm that this was the man that  
8 he was intending to talk to and he said he was affiliated,  
9 the next series of questions would have been confirming  
10 whether or not he was employed by a defendant and the call  
11 would've terminated.

12 THE COURT: So who did he think he was talking to?

13 MS. SCARLETT: So we spent a lot of time trying to  
14 backtrack how this happened and we can't precisely. All I  
15 can say to you is that from what I know working with case  
16 investigators, which I have been doing 20 years, oftentimes  
17 we get names through someone else. So we'll speak to  
18 someone. We'll get that information. They're helpful to  
19 us. And we'll say to them: Do you know anyone else who  
20 would be willing to speak to us? It's my best guess that  
21 that's how this happened and how we got his name. And it  
22 was divorced from any Google search that would have, as  
23 defense counsel had said, turned up immediately that he was  
24 an employee of one of the defendants.

25 THE COURT: Even though he told -- as I understand

1 it, Mr. Isaacs told Mr. Reininger that he understood he had  
2 worked for companies in the pork industry?

3 MS. SCARLETT: But Mr. Isaacs believed that he was  
4 one of the farmers, which is what our investigation was  
5 looking at.

6 THE COURT: So what does industry mean?

7 MS. SCARLETT: I think industry is very overbroad,  
8 and there's a big difference between wanting to talk to one  
9 of the pork farmers that are selling the hogs versus one of  
10 the pork processors that are further up the chain that are  
11 the defendants in this case. So that's where the disconnect  
12 was.

13 So at the outset, the interview on a call that was  
14 very short, two minutes, when these types of disclosures  
15 oftentimes take up to ten minutes. Many times witnesses  
16 have a lot of questions about who we are. Hagens Berman.  
17 We often refer them to our website. We have this case  
18 listed on our website. There are oftentimes the list of the  
19 counsel and our attorneys on the case. We go over who those  
20 are. We go over who we are before we ever get into what is  
21 the substance of the back and forth of the questions that  
22 our case investigator would have about this.

23 So when the defendants are asking for disclosures  
24 to be made at the outset -- and what I think I heard my  
25 opposing counsel say even in a voicemail -- that type of

1 thing simply is not feasible conducting these types of case  
2 investigations.

3 For example, even leaving it in a voicemail were  
4 this to be required for us in conducting interviews of any  
5 non-party in this industry, would we need to leave all of  
6 this information in a voicemail, for example, for a  
7 non-testifying expert that I'm trying to retain from a  
8 university? How much is it that we need to leave in that  
9 initial voicemail? There is a certain unworkability about  
10 the defendants' proposal.

11 The second part of their guidelines are that we  
12 inquire whether or not the employee is current. Of course,  
13 that's something that we do as soon as we can verify. But  
14 there is that first step of verifying identity that needs to  
15 happen.

16 Defendants have also requested that we inquire  
17 whether the individual contacted is currently represented,  
18 but that's not the test. The test is whether or not they're  
19 currently represented and it has to be the subject of the  
20 representation. And *McCormick*, cited by defendants, makes  
21 this clear. It's not simply where someone is represented  
22 and, say, for example, has a family attorney, has a personal  
23 injury attorney because of a car accident. There are many  
24 instances where people are represented that are completely  
25 unrelated to the subject matter, which is another part of

1       their guidelines that they are requesting that's  
2       extraordinarily overbroad.

3               Whether or not the witness has the right to have  
4       the counsel of their choosing is another perplexing one.  
5       And I think Your Honor picked up on this. This is something  
6       that has been ordered in other cases, but not to the breadth  
7       here. And for witnesses that are being contacted and  
8       interviewed that makes it sound as if there are criminal  
9       proceedings that are being engaged, that they have the right  
10      to the counsel of their choosing. Of course, they could  
11      have any counsel they choose, but then they'd have to pay  
12      for it. And it becomes a very burdensome and onerous task  
13      to have industry participants have to retain individual  
14      counsel and then pay an hourly rate of \$200 an hour to  
15      simply have an interview with us where we're only seeking  
16      background information, for example, about hog farming and  
17      what does the practice of hog farming look like, and who  
18      owns the hogs, how are they sold, are there are auctions,  
19      basic questions like this that in truth there is no real  
20      need for that person to have counsel of their choosing as  
21      would be suggested in a criminal investigation.

22              THE COURT: Let me back up a moment to verifying  
23      identity.

24              MS. SCARLETT: Absolutely.

25              THE COURT: What exactly does that mean to you or,

1 more precisely, what exactly does that mean to your  
2 investigators? Because, I mean, presumably he ascertained  
3 that John Reininger was John Reininger. Was that verifying  
4 identity or -- because it didn't verify what needed to be  
5 verified to ascertain more quickly that the call needed to  
6 conclude.

7 MS. SCARLETT: So I can speak more generally about  
8 what I know when we verify the identity. Oftentimes we'll  
9 have a name and a city and that's it. And it's very  
10 difficult to know whether or not the name of the person that  
11 you have -- there may be, let's say, Joe Scott in Blaine,  
12 Washington. There might be seven Joe Scotts in Blaine,  
13 Washington. We need to make sure that we have the right Joe  
14 Scott, the one that worked in the industry. So there is a  
15 series of questions.

16 And at the same time I think you are trying to  
17 build a rapport with the witness to see if they are  
18 comfortable talking to you or not; some people are not.  
19 Some people hang up the phone right away. To build that  
20 rapport is part of it.

21 So when verifying the identity, it is to make sure  
22 (1) that they are the person that you thought they were; (2)  
23 that they are in the geographical location that you thought  
24 they were; and then whether or not they are participating in  
25 the industry that we are investigating. And so verifying



1 identity have kind of those three steps to it.

2 And, again, when Mr. Isaacs had asked the question  
3 of whether or not he was affiliated with the pork industry,  
4 the answer was no, and that's when the call was terminated.  
5 So it's a critical part to know that the person Joe Scott  
6 that we're trying to call is actually affiliated with the  
7 pork industry and we're not just broadly announcing to  
8 people who have no interest in it that, you know, we're  
9 investigating the pork industry for certain parts of  
10 collusion. That's not something that we would speak broadly  
11 about during any phase of the case, other than being in  
12 court with Your Honor.

13 THE COURT: So what then stopped Mr. Isaacs or  
14 what inhibited Mr. Isaacs from asking the question -- and  
15 I'm going to set aside the emails. I understand your points  
16 on that. But once there was a live conversation going on,  
17 what stopped Mr. Isaacs from asking him at an earlier point  
18 in this conversation?

19 I guess two minutes on the phone is in the eye of  
20 the beholder. There are some calls where two minutes is way  
21 too long as far as I'm concerned, but that's another  
22 subject. But what stopped Mr. Isaacs from asking the  
23 question much earlier in the conversation are you affiliated  
24 in any way with the pork industry? It sounds like if  
25 Mr. Reiningger had said no, the call would have ended then.

1 If he would have said yes, of course, the next questions  
2 would have needed to be with whom or in what capacity so  
3 that then he could figure out whether he needed to shut down  
4 the call.

5 MS. SCARLETT: Again, this is hearsay. And I want  
6 to emphasize again that I trust Mr. Isaacs implicitly. I  
7 believe he comports himself according to the highest  
8 professional standards.

9 It's my understanding that he was trying to get at  
10 whether or not this witness has an affiliation with the pork  
11 industry. That is why he was saying that he was interested  
12 in speaking with hog farmers, particularly interested in  
13 speaking with people who worked on a farm.

14 It's our belief at Hagens Berman that he did get  
15 to the identity verification as quickly as he could. It  
16 took two minutes or less than two minutes. From our  
17 perspective, that's a short period of time after you start  
18 going through introductions and asking the name and pauses  
19 and how fast people speak. Two minutes to us seems like a  
20 very short period of time for Hagens Berman to have gotten  
21 to the point where there was a lack of verification working  
22 on this person in the industry and the call was terminated.

23 So from my perspective, I, again, trust Mr. Isaacs  
24 and trust him to have done everything properly. When he  
25 says it took a minute and a half, a minute and 45 seconds to

1 get to that point, I trust that that was true and that he  
2 was trying to explain to the witness that he was interested  
3 in hog farmers.

4 THE COURT: Have you made changes to your protocol  
5 or are you proposing to make changes to your protocol either  
6 in the preparation for the calls or on the calls themselves  
7 to assure that something like this doesn't happen again?

8 MS. SCARLETT: So we have made one change to our  
9 protocol. So, again, I've been doing these type of witness  
10 interviews for 20 years, and we only give a privilege  
11 instruction to not divulge privileged information if after  
12 talking with the witness and verifying that they are a  
13 former employee and they worked for the company during the  
14 time period we're interested in.

15 If we believe because of their position they might  
16 be in a place to have access to privileged information, we  
17 give them a very strong instruction that they are never to  
18 divulge privileged information to us.

19 We don't give that instruction usually if it's  
20 just a person involved in an industry or if it's a former  
21 employee that was not in a position that we would believe  
22 they would ever have access to in-house counsel or outside  
23 counsel. So we've changed that instruction.

24 At this point, before the interview is to be  
25 conducted, we will in this case give an instruction that

1       they should not divulge privileged communications during the  
2       interview, regardless of whether or not we believe they  
3       would be in a position to have those communications.

4               THE COURT:   If we were to think about the  
5       disclosures that your investigator makes to someone that  
6       they come to believe is not a current or former employee  
7       versus the disclosures that they make if they determine  
8       someone is a former employee -- because my understanding is  
9       once they conclude someone is a current employee, boom, call  
10      is over.

11             MS. SCARLETT:   Correct.

12             THE COURT:   So if we would look at the difference  
13      between your protocol or in what you would be willing to  
14      agree that your protocol ought to include between the person  
15      that I now understand -- I'm making the call.   I now  
16      understand this person, as far as I can tell, wasn't ever  
17      employed versus this person -- it appears this person seems  
18      to have been a former employee of Clemens, what's the  
19      difference between the disclosures you agree should be made?

20             MS. SCARLETT:   So I think that would be the big  
21      difference in the two disclosures.   For anyone that has ever  
22      worked at a company we now give them a privilege  
23      instruction.

24             For someone who is never affiliated with a company  
25      and we're simply talking to them about more neutral topics

1       like pass-through or a professor that we want to interview  
2       or a non-testifying consultant -- there's honestly a list  
3       too long for me to go through; I'm just giving you the three  
4       examples off the top of my head -- but for those we make  
5       sure that it's clear who we are, what firm we are, what case  
6       this is regarding. And usually there is a conflicts check  
7       run by phone, whatever it is, and then the interview would  
8       proceed.

9               So I think the big difference between those two  
10       buckets is really that now our protocol includes the  
11       instruction of privilege.

12              THE COURT: When you say the "instruction of  
13       privilege," regardless of what that person's role was with  
14       the company, whether or not there is reason to believe that  
15       they were at a position where they might have had access to  
16       privileged information?

17              MS. SCARLETT: That's correct, Your Honor. But we  
18       think that's well beyond what the case law requires.

19              THE COURT: I understand the distinction you're  
20       drawing, but I just want to make sure I understand what that  
21       protocol now is.

22              Okay. Anything else?

23              MS. SCARLETT: No, Your Honor.

24              THE COURT: All right. Thank you.

25              Yes.

1 MR. CLARK: Your Honor, I told you I wouldn't  
2 speak and here I am.

3 THE COURT: Here you are.

4 MR. CLARK: Brian Clark, Direct Purchaser  
5 Plaintiffs.

6 You asked counsel for Clemens regarding the meet  
7 and confer process under Local Rule 7.1(a) and whether it  
8 was adequate. The answer is no. As we submitted in our  
9 Docket No. 381, there was no meet and confer whatsoever with  
10 the Direct Purchaser Plaintiffs. Our notice of this issue  
11 at all was from the filing by defendants.

12 I heard the word repeated again and again today of  
13 "plaintiffs" broadly, including all three classes. We filed  
14 our papers assuming that defense counsel would correct their  
15 incorrect statement in their meet and confer statement and  
16 also in their brief lumping all plaintiffs together.

17 We stated clearly we were not involved with this  
18 conduct. It makes me question why there hasn't been a  
19 corrected filing or correction to the meet and confer  
20 statement since the time we filed this on October 15th.  
21 It's over a month later now. I just would like to make that  
22 clear.

23 I have continued to hear the word "plaintiffs"  
24 used throughout the proceedings today and, as far as I know,  
25 this is a motion regarding the Consumer Indirect Purchaser

1 Plaintiffs, not Direct Purchaser Plaintiffs or my colleagues  
2 with the Commercial and Institutional Indirect Purchaser  
3 Plaintiffs.

4 THE COURT: All right. Thank you.

5 MR. CLARK: Thanks.

6 THE COURT: Mr. Raiter.

7 MR. BERNICK: Your Honor, this is Justin Bernick,  
8 counsel for Agri Stats. I have one thing I would like to  
9 raise. I also did not anticipate speaking. If now is the  
10 appropriate time, I'd be happy to do that.

11 THE COURT: Now would be fine, and then I'll get  
12 to Mr. Raiter. Go ahead, Mr. Bernick.

13 MR. BERNICK: Thank you, Your Honor.

14 So there's been a suggestion here that this was an  
15 isolated incident, that the plaintiffs' focus here is on  
16 contacting non-parties and other individuals. We had a  
17 similar situation with Agri Stats that we alerted plaintiffs  
18 to where Mr. Isaacs contacted a current Agri Stats employee.

19 Again, this employee, their profile makes it clear  
20 they are a current employee. He left a voicemail saying he  
21 was a researcher calling Agri Stats employees and asked her  
22 to call back. And, thankfully, this woman had the presence  
23 of mind to reach out to the Human Resources person in Agri  
24 Stats to try to confirm what was going on. We chased it  
25 down. But she was very confused.

1           She didn't know who was calling her, didn't know  
2           if it was us -- the attorneys for Agri Stats -- reaching out  
3           to her asking questions, which we obviously have been doing  
4           in the course of representing the company or --

5           THE COURT: Hold on. Hold on. Mr. Bernick, you  
6           are speaking way too fast.

7           MR. BERNICK: Oh, I'm sorry.

8           THE COURT: Go ahead. Why don't you back up a few  
9           sentences and take it a little slower.

10          MR. BERNICK: Absolutely. I apologize, Your  
11          Honor.

12          So I was just relaying the details of a particular  
13          incident related to Mr. Isaacs and Agri Stats. He left a  
14          voicemail for a current Agri Stats employee, Ms. McGettigan,  
15          who her LinkedIn profile also discloses that she is a  
16          current employee of Agri Stats. The voicemail that  
17          Mr. Isaacs left for her said that he was a researcher  
18          calling Agri Stats employees, please give him a call back.

19          And thankfully this individual had the presence of  
20          mind to reach out to the internal HR person at Agri Stats --  
21          there is no in-house counsel at Agri Stats; they're a small  
22          company -- to try to confirm what this was.

23          She didn't know if it was us, Agri Stats' outside  
24          counsel, contacting her, as we have done from time to time  
25          to ask questions about the case, or if this was somebody



1 else. Thankfully, she raised it up the flagpole and did not  
2 call him back.

3 The only reason I raise that is because I think  
4 there's been a suggestion here that this only relates to  
5 non-parties and that this was an outlier. It sounded from  
6 the voicemail that this was a deliberate strategy to reach  
7 out to employees, or at least former employees, but  
8 certainly employees and parties. And the voicemail did not  
9 provide sufficient disclosure for this individual to know  
10 who the individual was.

11 We raised the issue with plaintiffs and they  
12 responded and said that from their vantage point, everything  
13 was above board. We disagree with that position. But I  
14 wanted to make sure that I made that point because I wasn't  
15 aware that the plaintiffs would be taking the position that  
16 this was somehow an outlier or some sort of anomaly. From  
17 our vantage point, this seemed from the voicemail to be a  
18 deliberate strategy of reaching out to the employees of the  
19 parties.

20 THE COURT: All right. Thank you, Mr. Bernick.

21 Mr. Raiter.

22 MR. RAITER: Thank you, Your Honor.

23 I echo the comments from Mr. Clark. On behalf of  
24 the Commercial Indirects, there was no attempt to meet and  
25 confer by the defendants. There was no notice of this issue

1 to us. And the suggestion that it is plaintiffs, which is  
2 intentional, is misleading. They keep doing it. We just  
3 heard it on the phone. It wasn't the plaintiffs. It wasn't  
4 the Commercial Indirects. It wasn't the Directs.

5 That is not to say that this contact was  
6 inappropriate in any sense, but the suggestion that we're  
7 all lumped together here as plaintiffs is simply wrong and  
8 it's misleading. It was pointed out to defense counsel and  
9 they have not corrected it and they should. They have no  
10 motion before us this morning or directed to the Commercial  
11 Indirects. They haven't made such a motion. They didn't  
12 meet and confer about such a motion. And to suggest that we  
13 should all be lumped in together, again, is inappropriate.

14 MS. SCARLETT: May I respond briefly to  
15 Mr. Bernick?

16 THE COURT: Okay, but then I want to give  
17 Ms. Briesacher an opportunity to respond as well. Yes. Go  
18 ahead.

19 MS. SCARLETT: I just want to respond to  
20 Mr. Bernick from Agri Stat's suggestion that this is a  
21 deliberate strategy by the plaintiffs. I would just point  
22 out, Your Honor, that was a voicemail. Our case  
23 investigator never spoke with the employee; had he, the  
24 first steps would have been to verify identity and then to  
25 discover whether or not she was a current employee of one of

1 the defendants and then the call would have terminated.

2 To suggest --

3 THE COURT: So are you saying it's incorrect that  
4 the voicemail from Mr. Isaacs said I'm trying to reach  
5 employees of Agri Stats? I'm trying to talk to employees of  
6 Agri Stats?

7 MS. SCARLETT: As I'm standing here today, I just  
8 don't know whether or not that's what Mr. Isaacs would say  
9 and that the voicemail said or not. I just don't have any  
10 information on that. But I can just tell you it is our  
11 policy to not speak with current employees.

12 And so to suggest there is a deliberate strategy  
13 here is incorrect versus what we see the state of affairs,  
14 which is a very large case with 12 defendants, many of whom  
15 have hundreds of employees, that there are now arguably two  
16 incidents where a current employee was conducted. But had  
17 our investigator gone through the steps, the call would have  
18 terminated. We have no intention of speaking with current  
19 employees.

20 THE COURT: Let me just ask one other question.  
21 With respect to the practicalities of what can or can't be  
22 said on a voicemail, what if, for example, the protocol  
23 called for the investigator on the voicemail to disclose who  
24 he was and who he was calling on behalf of?

25 MS. SCARLETT: If a protocol were in place that

1 required, for example, a case investigator to say I'm so and  
2 so and I work for this law firm, I think the practicality of  
3 that would be very few people would call us back. When  
4 people hear that there is a law firm, they are generally  
5 fearful that they're in trouble and that they have done  
6 something wrong.

7 I think that having that kind of protocol, which  
8 we don't see in the case law, we've never seen required by  
9 any other court, is the type of thing that has a real  
10 chilling effect on case investigations, which brings you  
11 back to my opening statement and why I told you this is  
12 necessary. These cases are very difficult. Conspiracies  
13 conduct themselves in secret. And without the ability to  
14 have a factual investigation take place, many of these types  
15 of cases would not be brought.

16 THE COURT: Okay. Thank you.

17 Ms. Briesacher.

18 MS. BRIESACHER: Your Honor, I'd first like to  
19 address the comments made by the other two groups of  
20 plaintiffs.

21 So when we -- as we kind of were preparing for  
22 this motion, you know, we did direct our meet and confer  
23 efforts at the party whose conduct we had concerns about,  
24 and that was the Consumer Indirect Plaintiffs.

25 It is fair to say that we did not meet and confer

1 with the other two groups of plaintiffs because we had no  
2 reason to believe they were engaging in similar conduct.

3 We raised and filed this motion again focusing on  
4 the party whose tactics we were concerned about. Again,  
5 that's the Consumer Indirect Plaintiffs. I think our motion  
6 makes clear kind of whose conduct we're troubled by.

7 But in this instance, you know, we're not asking  
8 for sanctions. We're not asking for anyone to be  
9 disqualified. We're here really asking for the Court's  
10 guidance.

11 THE COURT: But you are asking for an order that  
12 would apply across the board, including to all plaintiff  
13 groups, presumably to all defendants as well.

14 MS. BRIESACHER: Correct, Your Honor. We're just  
15 asking everyone to follow the ethical rules. And I would  
16 anticipate that any guidance or orders that the Court issued  
17 would be applicable to everyone, not just one group of  
18 plaintiffs.

19 Second, I wanted to address the voicemail point.  
20 We do not assert that all six disclosures need to be made on  
21 a voicemail. But, at a minimum, the plaintiffs should be  
22 indicating who they are and who they're representing and the  
23 purpose of the case. I know plaintiffs have concern that  
24 they think it's going to lead to some confusion or  
25 misunderstandings about what the call is about, but the

1 reality is right now they're being misleading in a voicemail  
2 saying they're researchers and then they're on a call and  
3 not immediately correcting that misunderstanding that they  
4 have created.

5 THE COURT: But as long as -- I guess isn't it  
6 what matters is that the necessary disclosures are made  
7 before substantive information is gathered, information that  
8 would go to the merits of claims or defenses in the case?

9 MS. BRIESACHER: Your Honor, I think that this  
10 case, kind of what happened here, shows that just saying it  
11 needs to happen before substantive communications is too big  
12 of a gray area.

13 THE COURT: Well, what substantive communications  
14 happened here?

15 MS. BRIESACHER: Your Honor, here -- I mean, the  
16 call -- well, the call did stop after two minutes, but there  
17 were significant -- I mean, two minutes is a long time.  
18 They asked about his experience hog farming. They were able  
19 to ask him if he worked on a hog farm between certain years.  
20 I know that there seems to be a fact dispute about what was  
21 discussed. If what the plaintiffs say is true, that they  
22 asked are you John Reininger, do you work for the pork  
23 industry and he said no. That's a 10-second conversation.  
24 So clearly there were more discussions here.

25 During the course of these discussions,

1 Mr. Reininger was still under the false -- kind of the false  
2 belief that this was an academic researcher. He didn't know  
3 that they were the plaintiffs.

4 So if you don't say it immediately -- hi, I'm so  
5 and so, I work for the plaintiffs, I'm here to talk about  
6 this case -- you run the risk of substantive communications  
7 happening then before these disclosures be made.

8 So, Your Honor, we're here just asking for a  
9 simple rule at the outset of the call and not to have  
10 several minutes go by before these disclosures be made,  
11 because then you risk what we are concerned about and that  
12 these substantive discussions and privileged communications  
13 could be revealed because the person doesn't understand who  
14 they are on the phone with.

15 Thank you.

16 THE COURT: I am concerned that there was not, as  
17 my practice pointers require, an actual interactive  
18 conversational meet and confer. I can't tell from this  
19 conversation whether that would be a waste of time or not.  
20 It sounds like there are some areas where the parties are in  
21 agreement. It sounds like there are some others where  
22 probably they wouldn't be. But I'd still like you to have  
23 gone through that step of giving it a try, of sitting down  
24 and thinking about what things you can agree you want to  
25 avoid, what things you can agree ought to be part of a

1 protocol, and if you still depart/diverge where those  
2 limited areas are.

3 I am concerned about what happened here. And I  
4 have no reason to doubt your representations about  
5 Mr. Isaacs, but I am concerned that, given Mr. Reininger's  
6 position in Clemens and how easily discernible it would have  
7 been from a number of sources, I am concerned that that call  
8 was made.

9 On the other hand, I don't have anything on the  
10 record, or otherwise, to tell me that there was some  
11 substantive information passed along.

12 I'm hearing Mr. Bernick saying that there was a  
13 contact with another current employee, but I don't have  
14 anything in the record to that effect. Not that I doubt  
15 Mr. Bernick, but I don't have anything from anybody who was  
16 directly involved in that call about what happened.

17 I do believe that what defendants are asking for  
18 goes beyond what you're entitled to get, and I don't think  
19 anything that happened here justifies going that far. But I  
20 don't want to have you back here every month or six weeks  
21 either arguing about, well, did this one cross the line or  
22 did that one cross the line.

23 So I do think it would make sense for you all to  
24 take a good-faith run at sitting down together, including  
25 the plaintiffs who weren't a part of this, because I'm not



1       sure -- I mean, I could enter a limited order, if I were so  
2       inclined, directed to one set of plaintiffs, but it would be  
3       much better if there was a set of basic working rules of the  
4       road that applied across the board and not on a  
5       party-by-party basis.

6               So I am going to require you to take a shot at  
7       seeing whether you could agree to some kind of stipulation  
8       for this is how we're going to approach these contacts going  
9       forward. And I'm going to have you -- you're welcome to use  
10      one of the lovely conference rooms that are here; or if  
11      you've got flights to catch and that's not going to work, to  
12      set up a time to talk on the phone. But I'm going to  
13      require that you get back to me -- what day is today? Oh,  
14      my calendar says it's January 2020 already. That's not  
15      right. Okay. So today is the 19th. I would like -- and  
16      we've got Thanksgiving in the middle of things. I want you  
17      to get back to me with a joint report by December 2nd and  
18      let me know whether you've been able to agree to all of or  
19      most of, let's say, some rules of the road, whether they're  
20      by stipulation or by -- however you want to express it, but  
21      something that leaves everybody comfortable that you're all  
22      on the same page; or, if not, how far you did get by way of  
23      agreement and where you part company.

24              And then based on that, I'm going to hold this  
25      motion in abeyance for the time-being. Let me see what you

1 report back to me. I think you can tell by the questions  
2 I'm asking where I've got concerns and on both sides.

3 By way of one more piece of guidance, I am  
4 inclined to agree that as long as a voicemail doesn't  
5 affirmatively misrepresent who somebody is calling from, I'm  
6 not inclined to think that a voicemail is a really workable,  
7 practical place to leave this information. But once you're  
8 on the phone live, it seems to me you all ought to be able  
9 to agree to some understandings about how the call will  
10 proceed from there. I would at least like to give you that  
11 opportunity.

12 So let me hear back from you by joint letter on  
13 December 2nd. The letter probably ought to be e-filed,  
14 rather than emailed, because I think it's important we have  
15 a record of what you could or couldn't agree on. And then  
16 once I get that, I'll see what's left of this motion, and I  
17 will either bless the stipulation or I will take the motion  
18 under advisement and get an order out as soon as I can.

19 Any questions about that direction?

20 MS. BRIESACHER: No, Your Honor.

21 THE COURT: All right. Thank you all.

22 Did I hang up on you all on the phone?

23 UNIDENTIFIED MALE SPEAKER: Thank you, Your Honor.

24 THE COURT: Thank you. If I don't see you before  
25 Thanksgiving, have a good one.

1 (Court adjourned at 11:00 a.m.)

2 \* \* \*

3 I, Debra Beauvais, certify that the foregoing is a  
4 correct transcript from the record of proceedings in the  
5 above-entitled matter.

6 Certified by: s/Debra Beauvais  
7 Debra Beauvais, RPR-CRR  
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